

NOT DESIGNATED FOR PUBLICATION

No. 119,483

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ADAM M. RING,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; WILLIAM S. WOOLLEY, judge. Opinion filed September 6, 2019. Affirmed.

Jennifer C. Roth, of Kansas Appellate Defender Office, for appellant.

Lesley A. Isherwood, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before HILL, P.J., STANDRIDGE, J., and NEIL B. FOTH, District Judge, assigned.

PER CURIAM: Adam M. Ring appeals from the district court's revocation of his probation and corresponding sentence. After a probation violation hearing, the district court bypassed the intermediate sanctions requirement and sentenced Ring to prison, finding that he had committed a new crime and was a threat to public safety. On appeal, Ring makes three claims of error, all seeking remand for resentencing and the application of intermediate sanctions. First, Ring claims the State did not allege that he committed a new crime in its probation revocation warrant and therefore the court could not rely on such a finding to bypass intermediate sanctions. Second, Ring claims that the district court erred when it failed to explicitly state what burden of proof it applied in finding that

Ring had violated his probation. Third, Ring claims that the district court's finding that he was a threat to public safety lacked sufficient particularity and did not justify invoking the public safety or violator welfare exceptions to the intermediate sanctions requirement. We disagree with each of Ring's contentions and affirm the district court.

Facts

In November 2017, Ring pled guilty to aggravated domestic battery, a level 7 person felony, in violation of K.S.A. 2018 Supp. 21-5414(b)(1), (c)(2), and felony theft, a level 9 nondrug grid, nonperson felony in violation of K.S.A. 2018 Supp. 21-5801(a)(4), (b)(3). The charges arose out of a domestic argument. The State alleged that Ring chased a woman down, grabbed her by the throat, forced her into a car, and struck her.

The district court sentenced Ring to 24 months of incarceration for the aggravated domestic battery charge and 6 months for the theft charge. The district court ran the sentences concurrent, for a total of 24 months. The district court then suspended that sentence and granted probation. The conditions of probation state: "That [Ring] shall abide by the rules and regulations of said program, to include: 1. That [Ring] understands that assaultive behavior, violence or threats of violence are totally unacceptable and agrees not to engage in this type of behavior."

Less than a month later, the district court issued a probation violation warrant for Ring's arrest alleging that he had failed to report to his probation officer and failed to provide a valid address and phone number.

The district court issued a second probation violation warrant for Ring less than three months after his sentencing. This warrant read, "On January 12, 2018, [Ring] engaged in assaultive behavior as alleged in Wichita Police Department Incident Report Number 18C002637." Ring appeared on this warrant, and a probation revocation hearing

was held about a month later. Ring stipulated to the violations alleged in the first warrant but contested the allegations of the second. At the hearing on the contested second warrant, the State presented the following evidence.

Justin Bassett testified that while he was driving in Wichita, he witnessed a man and woman fighting in front of a church. The man grabbed the woman, the woman attempted to put her hands up to defend herself, and the man continued to hit her face and chest. Bassett parked on the street and notified the police. Bassett identified the man as Ring.

Christopher Cronin lived in the house across the street from the church. At that same time, Cronin witnessed "[a]n old acquaintance of [his,]" Ring, having an argument with his girlfriend. Cronin witnessed the altercation through security cameras on his property. According to Cronin, Ring restrained his girlfriend from leaving by grabbing her arms. Ring fled on his bicycle before police arrived. Ring's girlfriend remained on Cronin's property.

Police officer Randy Gorges spoke with Cronin when he arrived on the scene. Officer Gorges prepared a police report of the incident that was referenced in the probation violation warrant.

After testimony, the district court noted that the State had the burden of proof, "but the burden of proof for a probation violation is not beyond a reasonable doubt, it's at a lesser standard." The district court then found "the State has met its burden of proving the allegation in the March 9th, 2018 warrant and finds that [Ring] violated the terms and conditions of his probation on that warrant."

Regarding sentencing, the district court stated:

"In this case it hasn't been very long from sentencing to where the first instance occurred, which was in January, as far as the assaultive behavior, and the Court is going to hold as a matter of law that the way it was stated in the warrant it's a new crime. And therefore, he committed a new crime within a short time from being sentenced, and with the fact that he committed a new crime the Court does not have to consider intermediate sanctions.

"Given the nature of the instance in the March warrant, and given the nature of the crime for which he has been sentenced, the Court finds that he's not amenable to further probation. The Court is going to revoke his probation. In addition, the Court makes an additional finding that because of the nature of the crime for which he was sentenced and because the nature of the new crime in the warrant, which the Court found he committed, finds that the safety of the members of the public will be jeopardized by keeping him on probation. Therefore, the Court will revoke and direct the defendant to serve his sentence."

Did the State Sufficiently Allege that Ring Committed a New Crime in Its Probation Revocation Warrant?

Ring's first claim is that the State alleged that Ring violated the terms of "his probation by engaging in behavior he agreed not to engage in" but "did not allege that he committed a new felony or misdemeanor." Going further, Ring claims "that the State must allege in its warrant that . . . Ring has committed a new crime in order for the State to seek, and the court to find, a new crime exception to the intermediate sanctions rule." In essence, Ring alleges that the warrant had to read "committed an assault" rather than "engaged in assaultive behavior." Ring does not challenge the sufficiency of the evidence for the district court to find that he had committed a felony or misdemeanor under any burden of proof, just that it was not properly alleged in the warrant.

Ring recognizes that this issue is first raised on appeal but claims that this court may still consider it because it is a question of law.

Issues not raised before the trial court cannot be raised on appeal. See *State v. Kelly*, 298 Kan. 965, 971, 318 P.3d 987 (2014); *State v. Cheffen*, 297 Kan. 689, 698-99, 303 P.3d 1261 (2013). However, there are several exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal, including the following: (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the judgment of the trial court may be upheld on appeal despite its reliance on the wrong ground or having assigned a wrong reason for its decision. *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014).

Supreme Court Rule 6.02(a)(5) (2019 Kan. S. Ct. R. 34) requires an appellant to explain why an issue that was not raised below should be considered for the first time on appeal. In *State v. Williams*, 298 Kan. 1075, 1085, 319 P.3d 528 (2014), the Supreme Court held that litigants who fail to comply with this rule risk a ruling that the issue is improperly briefed, and the issue will be deemed waived or abandoned. Thereafter, the Supreme Court held that Rule 6.02(a)(5) would be strictly enforced. *State v. Godfrey*, 301 Kan. 1041, 1044, 350 P.3d 1068 (2015).

Ring argues that the first exception applies and that his newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case. In Ring's brief, however, he summarily presents this position in one sentence as "[w]hether the district court could take a technical violation alleged by the State and transform it into a new crime finding under K.S.A. 22-3716(c)(8) is a question of law." Ring offers no explanation as to why the issue was not raised below, why he believes all relevant facts are proved or admitted, or specifically why he thinks

his argument would be dispositive of the case. Ring's argument also presumes a finding by this court that the warrant language in question, "[Ring] engaged in assaultive behavior as alleged in Wichita Police Department Incident Report Number 18C002637," alleges a technical violation of probation and not a substantive violation. Finally, Ring does not cite any law supporting the essence of this contention: that a probation violation warrant must use the term "felony or misdemeanor," allege a particular criminal statute violated, or otherwise more specifically allege a crime.

This court finds that because Ring failed to object below and has not adequately briefed the issue on appeal, the claim is waived.

Did the District Court Err by Failing to Specifically State the Standard of Proof Used?

Ring's second claim is that "[b]ecause the record gives no indication what standard the court used in finding a 'new crime' in the context of [Ring's] probation violation, this Court should reverse the district court's new crime finding and remand for a new hearing."

Again, Ring did not raise this issue or otherwise object in the district court but asserts that this court can consider the issue because the proper standard of proof is purely a question of law. Ring also argues that using an improperly low burden of proof to find that he committed a new offense in violation of his probation would violate his fundamental right to due process. This court agrees and will consider the issue.

Whether the district court applied the correct standard of proof is a question of law over which an appellate court exercises unlimited review. *State v. Huckey*, 51 Kan. App. 2d 452, 454, 348 P.3d 997 (2015). The assignment of the burden of proof involves a question of law subject to this court's unlimited review. *In re Moore*, 53 Kan. App. 2d 667, 681, 390 P.3d 551 (2017). By statute, "[b]urden of proof" means the obligation of a

party to meet the requirements of a rule of law that the fact be proven either by a preponderance of the evidence or by clear and convincing evidence or beyond a reasonable doubt, as the case may be. Burden of proof is synonymous with 'burden of persuasion.'" K.S.A. 60-401(d).

The burden of proving a probation violation is as follows:

"To sustain an order revoking probation on the ground that a probationer has committed a violation of the conditions of probation, commission of the violation must be established by a preponderance of the evidence. Once there has been evidence of a violation of the conditions on which probation was granted, the decision to revoke probation rests in the sound discretion of the district court." *State v. Gumfory*, 281 Kan. 1168, Syl. ¶ 1, 135 P.3d 1191 (2006).

More importantly, a district court "is presumed to have applied the correct standard of proof absent a showing to the contrary." *State v. Gideon*, 257 Kan. 591, 615, 894 P.2d 850 (1995).

During the probation revocation hearing, the district court made the following comments relating to the standard of proof:

"All right. What the Court is considering is whether or not the State has met its burden of proving the allegations in the March 9th, 2018 warrant, which is on January 12th, 2018, the defendant engaged in assaultive behavior as alleged in WPD Incident Report Number 18C2637. The State has the burden of proof, *but the burden of proof for a probation violation is not beyond a reasonable doubt, it's at a lesser standard.*

....

"... The Court finds the State has met its burden of proving the allegation in the March 9, 2018 warrant and finds that he violated the terms and conditions of his probation on that warrant.

....

". . . [A]nd because the nature of the new crime in the warrant, which the Court found he committed, [the Court] finds that the safety of the members of the public will be jeopardized by keeping him on probation." (Emphasis added.)

Ring's second claim fails for several reasons. First, the district court is entitled to the presumption that it applied the correct standard of proof absent a showing to the contrary. Ring makes no argument or citation to the record that would support such a showing. Ring's claim that "the court treated the probation violation hearing as a quasi-preliminary hearing" is just an unsupported conclusory statement. Second, the record supports a contrary conclusion that the district court used either a preponderance of the evidence standard or a clear and convincing evidence standard. Those are the only two possibilities authorized by statute for trial courts except for felony preliminary hearings. The district court is presumed to know this. The district court plainly said that the State had to *prove* its allegations, not that it had to establish probable cause. The court found that Ring *committed* a new crime, not that there was probable cause to believe that he had done so. If the district court improperly applied a clear and convincing standard it would be harmless error; it would only mean that the State more convincingly met its burden of proof than under the preponderance standard.

Ring offers no support for his contention that the district court must specifically state what burden of proof it is applying. Ring relies primarily on *State v. Williams*, No. 112,228, 2015 WL 5613253 (Kan. App. 2015) (unpublished opinion). In that case, a district court took judicial notice of the record from a felony preliminary hearing and specifically cited the probable cause finding of a different judge. This court specifically found that the lower court appeared from the record to have used the wrong burden of proof. 2015 WL 5613253, at *8. *Williams* has no applicability to our case. There is no evidence in the record that the district court applied the probable cause standard.

More applicable would be *State v. Schwarm*, No. 88,985, 2003 WL 22532930, at *3 (Kan. App. 2003) (unpublished opinion), where this court upheld nearly identical language used by the district court. A probationer argued that the district court applied an incorrect burden of proof at his revocation hearing because the district court stated:

"The State claims—and one other matter, the burden of, burden is upon the State. *Proof beyond a reasonable doubt is not required. The degree of proof required is much less than that.* The State must make a satisfactory showing from the evidence that the violations occurred." (Emphasis added.) 2003 WL 22532930, at *3.

While the district court did not articulate what standard it used, this court found the district court upheld the preponderance of the evidence standard *in practice* and also noted that it "reviewed the evidence presented and [was] equally convinced that the State met its burden of proof." 2003 WL 22532930, at *3.

We conclude the district court did not err in stating that it used a lesser standard than beyond a reasonable doubt or failing to state the standard used. The district court is entitled to a presumption that it applied the correct standard of proof, absent a showing to the contrary, and Ring fails to make that showing.

Did the District Court Make Sufficient Findings to Use the Public Safety or Violator Welfare Exceptions to the Intermediate Sanctions Rule?

Finally, Ring argues (primarily) that the district court failed to comply with K.S.A. 2018 Supp. 22-3716(c)(9)(A) because it did not sufficiently "set forth with particularity its findings for . . . Ring being a threat to public safety." Ring also argues that the evidence was insufficient, that the three witnesses' testimonies did not provide evidence of "harm or threat of harm," and that each did not witness the whole event. Ring states

that "[t]he [district] court settled on calling it an argument—but an argument does not make a safety risk to members of the public." Ring further argues that the court's finding that Ring was "not amenable to probation" does not fit within any of the statutory exceptions to bypass intermediate sanctions. He concludes that because the district court "did not explicitly set out with particularity how the safety of members of the public would be jeopardized by the court ordering . . . Ring to serve a sanction and then continue on probation," the district court erred and should be reversed.

K.S.A. 2018 Supp. 22-3716(c)(8)-(9) provide four exceptions district courts may use to bypass intermediate sanctions. These include (1) the defendant committed a felony or misdemeanor while on probation; (2) the defendant absconded from supervision; (3) "the safety of members of the public would be jeopardized by imposing an intermediate prison sanction[;]" and (4) the defendant's own "welfare would not be served by an intermediate prison sanction." *State v. Dooley*, 308 Kan. 641, 650, 423 P.3d 469 (2018); see K.S.A. 2018 Supp. 22-3716(c)(8)-(9). What is more, the third (public safety exception) and fourth (violator welfare exception) require the district court to complete the additional step not required for a new crime or absconding exception, that is to "find[] and set forth with particularity the reasons for finding that the safety of members of the public will be jeopardized or that the welfare of the offender will not be served by such sanction." K.S.A. 2018 Supp. 22-3716(c)(9)(A).

The district court made the following statements regarding these two exceptions to the intermediate sanctions requirement:

"Given the nature of the instance in the March warrant, and given the nature of the crime for which he has been sentenced, the Court finds that *[Ring]'s not amenable to further probation*. The Court is going to revoke his probation. In addition, the Court makes an *additional finding that because of the nature of the crime for which he was sentenced and because the nature of the new crime in the warrant, which the Court found he committed, finds that the safety of the members of the public will be jeopardized by*

keeping him on probation. Therefore, the Court will revoke and direct [Ring] serve his sentence." (Emphasis added.)

Ring claims these comments are insufficient to invoke the public safety and violator welfare exceptions enumerated in K.S.A. 2018 Supp. 22-3716(c)(9).

The *Dooley* case also provides guidance as to the appropriate level of particularity district courts must use to invoke the statutory bypass exceptions under K.S.A. 2018 Supp. 22-3716(c)(9). The Kansas Supreme Court found that to successfully implicate the statute's public safety or violator welfare exceptions, the district court must *explicitly* state its findings. *Dooley*, 308 Kan. at 652. The court

"pause[d] briefly to disabuse the State of the notion that a district court can implicitly state its reasons for making the findings . . . regarding public safety or violator welfare. That bypass subsection *explicitly* requires that 'the court finds and *sets forth with particularity the reasons for finding* that the safety of members of the public will be jeopardized or that the welfare of the offender will not be served by such sanction.'" 308 Kan. at 652.

The Supreme Court continued that ""[w]hen something is to be set forth with particularity, it must be distinct rather than general, with exactitude of detail, especially in description or stated with attention to or concern with details."" 308 Kan. at 652 (quoting *State v. Huskey*, 17 Kan. App. 2d 237, Syl. ¶ 2, 834 P.2d 1371 [1992]).

This court has stated that the provision's "'mandate of particularity requires district courts to make findings specific to individual defendants that do more than recite the defendant's violations—courts must offer some explanation for why public or personal welfare would not be served by continued probation.'" *State v. Rogers*, No. 114,590, 2016 WL 7032242, at *10 (Kan. App. 2016) (unpublished opinion), *rev. denied* 306 Kan. 329

(2017) (quoting *State v. Jackson*, No. 113,654, 2016 WL 2609638, at *6 [Kan. App. 2016]).

The district court in this case made findings, by reference to the larger record, that because Ring's new felony or misdemeanor was nearly identical, factually, to the felony domestic violence charge he pled guilty to only three months prior, that continuing him on probation would endanger the public, implicitly Ring's next girlfriend. However, the district court did not explicitly say that or make such findings. The court's findings were vague and conclusory, falling short of the "particularity" and "exactitude of detail" standards found in the caselaw. The findings do not explain why Ring would endanger the public or why Ring was "not amenable to further probation."

Consequently, because the district court failed to make findings with sufficient particularity required by K.S.A. 2018 Supp. 22-3716(c)(9)(A) and caselaw, it cannot invoke either the public safety or the violator welfare exceptions to bypass the intermediate sanctions requirement.

Despite the insufficient findings regarding the two above referenced exceptions, the district court's revocation of Ring's probation and imposition of his underlying sentence, without intermediate sanctions, is still affirmed. Because the district court properly utilized the new crime exception under K.S.A. 2018 Supp. 22-3716(c)(8), the district court had authority to revoke Ring's probation. See *State v. Cooper*, No. 119,036, 2019 WL 1496305, at *2 (Kan. App. 2019) (unpublished opinion), where the same intermediate sanction exceptions were at issue and finding that an appellate court will "generally uphold a probation revocation even when one ground the district court relied on may be invalid as long as another basis for the revocation was proper."

The district court here clearly indicated in the hearing record and in the journal entry that its bypass of the intermediate sanction was based on the finding that Ring had committed a new crime.

Affirmed.